No. 80-1930

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In the Supreme Court of the United States
October Term, 1980

STATE OF NORTH DAKOTA

Respondent,

vs.

GLEN WENDEL GRANRUD,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

MALCOLM H. BROWN
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QUESTION PRESENTED

Whether the trial court erred as a matter of law to the prejudice of Glen Wendel Granrud in failing to instruct the jury on the definition of "intentional", "knowingly", and "willfully" thereby denying Glen Wendel Granrud of his consititutional right to due process of law pursuant to the 14th Amendment to the Constitution of the United States?

PARTIES

All parties to this proceeding are set forth in the caption.

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No. _____

In the Supreme Court of the United States
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STATE OF NORTH DAKOTA

Respondent,

vs.

GLEN WENDEL GRANRUD,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

TO THE HONORABLE: The Chief Justice and Associate Justices of the Supreme Court of the United States.

Glen Wendel Granrud, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Dakota entered into the above-entitled case on January 29, 1981, and amended by the Supreme Court of North Dakota on February 20, 1981.

OPINIONS BELOW

The Supreme Court of North Dakota having issued an Opinion in this case, along with an Amendment to the Opinion, copies of which appear in Appendix A to this Petition at page A4. The Opinion is officially reported at N.D., 301 N.W.2d 398.

JURISDICTION

The Opinion of the Supreme Court of the State of North Dakota (Appendix A, page A4) was entered on January 29, 1981, with amendments being added February 20, 1981. A timely Petition for Rehearing was denied on February 24, 1981. The jurisdiction of the United States Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specifically set up or claimed under the Constitution of the United States. 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article 14, Section 1, to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws." (Emphasis added).

STATEMENT OF THE CASE

In the late evening of October 15, 1979, Glen Granrud and a friend, Clifford Ling, were involved in an incident in a parking lot and alley in Williston, North Dakota, in which Allen Turner was stabbed. Turner died as a result of a knife wound to the heart.

Prior to the knifing, Granrud and Ling had been drinking at various liquor establishments in Williston for approximately five hours and were on their way to another

liquor establishment, the Bavarian Room. As they were walking to the Bavarian Room, they observed Turner "herding" three 12- to 15-year old children to a parking lot behind the Northern Hotel, or what is referred to as the "Lag House", and accusing the children of throwing a beer bottle at his pickup.

Granrud and Ling approached Turner and words were exchanged concerning Turner's conduct toward the children. There is conflicting testimony as to whether or not this confrontation was in an alley or in a parking lot behind the "Lag House". There is a ledge approximately two feet high between the alley and the parking lot. Ling testified that the initial confrontation occurred in the alley. Granrud, Troy Arcand (one of the young boys), and Gary Clough (a friend of Turner's), testified that the initial confrontation occurred in the parking lot. During the course of the confrontation, Turner pulled a gun and waved it in the general direction of Granrud's head. Granrud testified that the gun was pointed at his head. At this point, the initial confrontation ended and Turner walked back to his pickup. The testimony is again conflicting as to whether or not Turner put the gun in his pickup at this time, and as to whether or not Granrud and Ling started to leave the area. Turner then started toward Ling and Granrud and a second confrontation

ensued. During this confrontation, Turner took swings or punches at both Ling and Granrud as they backed up. The last swing taken by Turner occurred as he stepped from the parking lot down to the alley and resulted in Granrud's glasses being knocked off. During this swing, Turner staggered back and fell to his knees. There was testimony that there was a red mark and blood on Turner's shirt after this confrontation. Turner died approximately four hours later as a result of a knife wound to the heart.

Granrud was subsequently arrested with a "buck knife" in his possession and charged with manslaughter. A twelve-man jury returned a verdict of guilty against Granrud.

During the course of the trial, Granrud's attorney requested that the jury be instructed on the culpability standards necessary for the State to prove in order for the State to obtain conviction. Granrud requested jury instructions on criminal definition of "intentionally", "knowingly", "negligently" and "willfully". The Court refused to give the instructions. The instructions as requested were the legal definitions of "intentionally", "knowingly", "negligently" and "willfully" appearing in the North Dakota Century Code at 12.1-02-02.

"Requirement of culpability.—1. For the purposes of this title, a person engages in conduct:

a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.

b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.

c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04 -02, awareness of the risk is not required where its absence is due to self-induced intoxication.

d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

e. "Willfully" if he engages in the conduct intentionally, knowingly, recklessly."

Glen Wendel Granrud appealed his conviction to the North Dakota Supreme Court, raising as error failure to instruct the jury on the legal definitions of "intentionally", "knowingly", "willfully" and "negligently".

In dealing with this assignment of error, the North Dakota Supreme Court said:

"The last issue raised by Granrud relates to the trial court's failure to instruct the jury on the legal definitions of "knowingly", "willfully", "intentionally", and "negligently".

Granrud was charged with manslaughter under § 12.1-16-02(1), NDCC, which provides as follows:

> "A person is guilty of manslaughter, a class B felony, if he:
>
> 1. Recklessly causes the death of another human being . . ."

This section, in setting forth what constitutes manslaughter, uses the expression "recklessly causes the death" but it does not use the expressions "knowingly", "intentionally", or "negligently", nor are they components of the crime of manslaughter as defined by statute.

The trial court instructed the jury on the definition of "recklessly", but refused to instruct the jury as to "knowingly", "intentionally", and "negligently", as requested by Granrud's counsel. The jury was given the following definition of "recklessly";

> "For purposes of criminal law, a person engages in conduct 'Recklessly'
>
> if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct."

Granrud points to the word "conscious" in this definition and asserts that the definition of "conscious" may imply knowing or willing conduct. Thus Granrud asserts that the jury should have been instructed on the

definitions of "knowingly" and "willfully". We disagree.

We believe that the instructions on "recklessly", as a whole, and in particular the phrases "conscious" and clearly unjustifiable disregard" and "such disregard involving a gross deviation from acceptable standards of conduct", correctly advise the jury of the law on "recklessly" at issue in this case. Furthermore, we believe instructions on components not a part of the crime charged and at issue would be inapplicable and improper, State v. Sheldon, 301 N.W.2d 604 (N.D. 1980)[1]; State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980), and would be surplusage and tend to confuse the jury. We conclude that the refusal of the trial court to give the requested instructions was not error."

On February 12, 1981, Glen Wendel Granrud timely petitioned the Supreme Court of North Dakota for rehearing. On February 20, 1981, the Supreme Court of North Dakota amended its Opinion as follows:

"The last issue raised by Granrud relates to the trial court's failure to instruct the jury on the legal definitions of "knowingly", "willfully", "intentionally", and "negligently".

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1980)[1]; State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980), and would be surplusage and tend to confuse[2] the jury. We conclude that the refusal of the trial court to give the requested instructions was not error.

On February 24, 1981, the Supreme Court of North Dakota denied the Petition for Rehearing.

The timely Petition for Rehearing, again questioned the lack of due process as a result of the trial court denial of the requested jury instructions.

REASONS FOR GRANTING WRIT

I. THE FAILURE TO INSTRUCT THE JURY ON THE QUESTION OF CULPABILITY DEPRIVED

---

[1]We do note that a petition for a writ of certiorari in the United States Supreme Court has been filed in State v. Sheldon. As of this date the record does not reflect what, if any, action the Supreme Court has taken on the petition.

[2]The terms "knowingly" and "willfully" are the equivalent of "intentionally" as that term is used in § 12.1-16-01, NDCC, defining murder. See also, § 12.1-02-02, NDCC. If the requested instruction were given it would elevate the culpability requirement of manslaughter to that of murder which would be confusing.

Section 12.1-16-02, NDCC, sets out the culpability requirement for manslaughter and, therefore, the rationale employed in Hanson, 256 N.W.2d 364 (N.D. 1977), is not applicable. In Hanson, the court was involved with § 12.1-17-03, NDCC, entitled "Reckless endangerment" but the body of the law did not set out the culpability requirement and, therefore, the court, pursuant to § 12.1-02-02(2), applied the culpability requirement of "willfully". However, this is not the situation in this case.

THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW SINCE THE JURY WAS IGNORANT TO WHAT THE STATE HAD TO PROVE BEYOND A REASONABLE DOUBT.

The trial court determined that it could be presumed that a jury knew the culpability definitions of intentionally, knowingly, negligently and willfully. The North Dakota Supreme Court determined that the definitions asked for in the requested jury instructions would be surplusage and tend to confuse the jury. They then concluded that the refusal of the trial court to give the requested instructions was not error.

The Petitioner, Glen Wendel Granrud, submits to this Court that a jury ignorant of culpability requirements is by far greater error than instructing the jury on what the culpability requirements in fact are. The Petitioner submits that because of the trial court's ruling and the sustaining of that ruling by the North Dakota Supreme Court, he has been deprived of his liberty without due process of law.

The definition of "recklessly" as given by the trial court was as follows:

"Recklessly. If he engages in the conduct in a conscious and clearly unjustifiable disregard of a substantial

likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from exceptable standards of conduct."

This instruction is similar to the culpability requirements as defined in "recklessly" found at 12.1-02-02 of the North Dakota Century Code.

The Petitioner, Glen Wendel Granrud, was charged with manslaughter under 12.1-16-02 of the North Dakota Century Code:

MANSLAUGHTER.—A person is guilty of manslaughter, a class B felony, if he: 1) recklessly causes the death of another human being; or 2) (not applicable).

The Petitioner submits to this Court that if his conduct is to be judged reckless, he must have a conscious disregard of relevant facts or risks. This in turn requires intent, knowledge and willful action.

A conscious disregard is a sharing of another's knowledge or awareness of an inward state or outward fact, a preceiving, apprehending or noticing with a degree of control, thought or observation.

There are numerous cases throughout the United States in the state and federal courts that support the proposition that "recklessly" includes the element of intent.

When a man stands to answer for a crime in which he can lose his liberty for twenty years, there must be some type of intent, knowledge and willful action. This has been the state of the law ever since Morrisette v. United States, 342 U.S. 246 (1951). This Court in Morrisette said,

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

> "The government asks us by feat of construction radically to change the weights and balances of the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendent of such benefit as he derived of common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such manifest impairment of the immunities of the individual should not be extended to common law crimes on judicial initiative."

In People v. Maldonado, 278 NE2d 225 at 231, 3 Ill. App. 3rd, 216, it was held the statutory definition of

recklessness when applied to the facts of a manslaughter prosecution meant driving which evidences deliberate disregard of life and property. In Yaun v. Baldridge, 131 SE2d 248 at 251, 243 S.C. 414, that Court held that recklessness means the doing of a negligent act knowingly. In People v. Cruciani, 327 NE2d 803 at 804, 38 N.Y.2d 306, 367 NYS2d 758, the concept of recklessly was held to incorporate scienter.

The essence of wanton and reckless conduct is intentional conduct. See Commonwealth v. Wolinsky, 316 Mass. 383, 55 NE2d 904.

The Courts nationwide have held that recklessness is when an actor has intentionally done an act of unreasonable character in a reckless disregard of the risks. Cats v. Beauregard Electric Coop, Inc., La. App. 316 S2d 907 at 916; State v. Meany, 115 NW2d 247 at 251, 262 Minn. 491; Reliance Insurance Co. v. Barron's, D.C.N.Y. 442 F.Supp. 1341 at 1349.

In State v. Mahalik, 173 A2d 897 at 898, 22 Conn. Supp. 401 Conn. Cir. 62, the Court said recklessly as used in the statute involves intentionally doing an act.

In State v. Saulmier, R.I. 280 A2d 85 at 87, that Court said recklessly means conscious and intentional.

In State v. Carpenter, 378 P.2d 188 at 190, 85 Idaho 232, that Court said reckless disregard of the safety of another takes place if one intentionally does not act or fails to do an act.

In State v. Verteseuille, 217 A2d 725 at 726, 3 Conn. Cir. 508, it was held that reckless misconduct is when one intentionally does an act.

In Saaybe v. Pennsylvania Central Transportation Co., D.C. Penn. 438 F.Supp. 65 at 69, that Court held that reckless means that the actor intentionally does an act or fails to do an act.

In Boucie v. Charleston and W. C. Railroad, 55 SE 163 at 167, 75 S.C. 116, the Court said reckless is the equivalent of intentional wrong.

In State v. Pickus, 257 NW 284, 63 S.D. 209, the word recklessly was held to connote the element of willfulness, deliberateness and affirmative intent.

CONCLUSION

The Petitioner, Glen Wendel Granrud, was denied a fair trial and due process of law when the Court refused to charge the jury relative to the element of culpability necessary to prove his guilt.

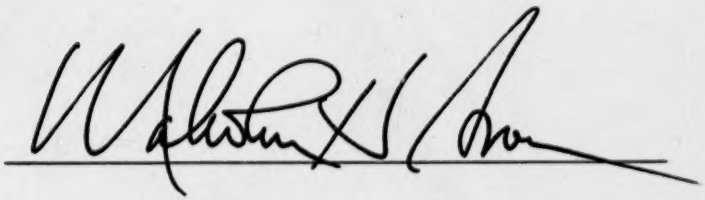
In so doing, the State has made the crime of manslaughter a crime where no evil purpose or culpability need be established by the State beyond a reasonable doubt in order to obtain a conviction.

Further, in so charging the jury, the State was not held to the burden of proof established by this Court. In the matter of Samual Winship, 398 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068, this Court held that the due process clause protects an accused against conviction except upon proof upon a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

See also Garrells Mullaney v. Stillman E. Wilbur, Jr., 421 U.S. 684, 44 L.Ed2d 508, 95 S.Ct. 1881 (1975).

For the reasons stated above and the cases cited within the body of this brief and in the conclusion, the Petitioner respectfully prays that a writ of certiorari be granted.

Dated this 29th day of April, 1981.



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APPENDIX

APPENDIX A

STATE OF NORTH DAKOTA — IN DISTRICT COURT

SS.

County of Williams — JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

vs.

Glen W. Granrud,

Accused.

CRIMINAL JUDGMENT

Docket No. 3842

Now, on this 23rd day of May, 1980, came L. Anseth State's Attorney of above County and State of North Dakota, and the Accused having appeared in person and (with) ~~(without)~~ E. Van Berkom Esq., legal counsel, and the Accused having been convicted by ~~(plea)~~ (verdict) of Guilty of the crime of Manslaughter, a class "B" felony, as (charged in the Criminal Information,) (found by the jury,) and the Accused having been informed by the Court of the nature of the charge against him, the penalty provided by

law, and of his plea to the Criminal Information (and the verdict thereon,) and the Accused having been asked by the Court whether he had any legal cause to show why Judgment and Sentence should not be pronounced against him, and no cause being shown,

IT IS HEREBY THE SENTENCE AND JUDGEMENT OF THE COURT

(1) That you be imprisoned in the state penitentiary for the term of ten (10) years (credit for custody time: two days) commencing at twelve o'clock noon of today;

(2) That you pay a fine in the sum of $Ten thousand (10,000) Dollars, due and payable as rapidly as earnings permit BUT not less than ten percent of monthly gross income;

(3) That you pay the cost of prosecution taxed in the sum of (to be taxed by the court) Dollars, due and payable as rapidly as earnings permit.

(4) That a portion of execution of the sentence portion of this Judgment is suspended and as follows:

That after you have served FIVE years (inclusive of any good time) the remaining sentence is SUSPENDED, for a period ending 23 May 1990, PROVIDED you COMPLY with these CONDITIONS during that period:

(1) You are not to commit another offense or break any laws.

(2) You are not to purchase or possess any firearm or other "dangerous weapon" as defined in NDCC 12.1-01-04(6).

(3) You report periodically to parole officer and not leave state without his written permission.

(4) You make restitution for victim's hospital and funeral expenses.

IF YOU FAIL TO COMPLY the Court may REVOKE this Suspension and cause you to be DELIVERED BACK TO THE PENITENTIARY FOR THE REMAINING FIVE (5) YEARS IMPRISONMENT.

THAT YOU STAND COMMITTED UNTIL THIS JUDGMENT, SECTION 1, 2, 3 and 4 IS COMPLIED WITH.

Dated this 23rd day of May, 1980.

BY THE COURT:

W.M. Beede
District Judge
District Court
North Dakota

ATTEST:
Mary M. Hueber
Clerk of said District Court
(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff and Appellee

v.

Glen Granrud,

Defendant and Appellant

Criminal No. 728

Appeal from the District Court of Williams County, the Honorable Wm. M. Beede, Judge.

AFFIRMED.

Opinion of the Court by Sand, Justice.

LeRoy Anseth, State's Attorney, Box 476, Williston, for plaintiff and appellee; argued by Cathy Howe Schmitz, Assistant State's Attorney.

Bair, Brown & Kautzmann, P. O. Box 100, Mandan, for defendant and appellant; argued by Dwight C. H. Kautzmann.

Criminal 728

State v. Granrud

SAND, Justice.

This is an appeal by the defendant, Glen Granrud, from a jury verdict of guilty of manslaughter.

In the late evening of 15 Oct. 1979 Granrud and a friend, Clifford Ling, were involved in an incident in a parking lot and alley in Williston, North Dakota, in which Alan Turner was stabbed. Turner died as a result of a knife wound to the heart.

Prior to the knifing, Granrud and Ling has been drinking at various liquor establishments in Williston for approximately five hours and were on there way to another liquor establishment, the Bavarian Room. As they were walking to the Bavarian Room they observed Turner "herding" three 12- to 15-year old children to a parking lot behind the Northern Hotel or what is referred to as the "Lag House" and accusing the children of throwing a beer bottle at his pickup.

Granrud and Ling approached Turner and words were exchanged concerning Turner's conduct toward the children. There is conflicting testimony as whether or not this confrontation was in an alley or in a parking lot behind the "Lag House". There is a ledge approximately two feet high between the alley and the parking lot. Ling testified

that the initial confrontation occurred in the alley. Granrud, Tony Arcand (one of the young boys), and Gary Clough, a friend of Turner's, testified that the initial confrontation occurred in the parking lot. During the course of the confrontation, Turner pulled a gun and waved it in the general direction above Granrud's head. At this point the initial confrontation ended and Turner walked back to his pickup. The testimony is conflicting as to whether or not Turner put the gun in his pickup at this time, and as to whether or not Granrud and Ling started to leave the area. Turner then started toward Ling and Granrud and a second confrontation ensued. During this confrontation, Turner took several swings at both Ling and Granrud as they backed up. The last swing taken by Turner occurred as he stepped from the parking lot down to the alley and resulted in Granrud's glasses being knocked off. After this swing, Turner staggered back and fell to his knees. There was testimony that there was a red mark and blood on Turner's shirt after this confrontation. Turner died approximately four hours later as a result of a knife wound to the heart.

Granrud was subsequently arrested with a "buck knife" in is possession and charged with manslaughter. A 12-person jury returned a verdict of guilty against Granrud, from which he appealed to this Court.

Granrud contends the trial court should have granted this motion for acquittal pursuant to Rule 29(a), North Dakota

Rules of Criminal Procedure, after the State rested its case. Granrud asserts that he established the validity of his alleged self-defense through cross-examination of the State's witnesses, and that in light of this evidence the State had not met its burden of proof at this point.

Rule 29(a), NDRCrimP, provides as follows:

"(a) Motion Before Submission to Jury.

"The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgement of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right."

In State v. Holy Bull, 238 N.W.2d 52, 57 (N.D. 1975), we addressed the requirements of a motion of acquittal under Rule 29, NDRCrimp, as follows:

". . . the trial court is required to approach the evidence from a standpoint most favorable to the prosecution, and is required to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt the motion for judgment of acquittal must be denied. 2 Wright & Miller, Federal Practice and Procedure, § 553, p. 486."

We have also observed that circumstantial evidence alone

may justify a conviction, provided it is of such probative force as to enable the trier of fact to say that the defendant is guilty beyond a reasonable doubt. State v. Chyle, 297 N.W.2d 409 (N.D. 1980); State v. McMorrow, 286 N.W.2d 284 (N.D. 1979). In instances in which circumstantial evidence is used, the role of the Supreme Court at the appellate level is to merely review the evidence to determine if there is competent evidence that allows the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. State v. McMorrow, supra; State v. Allen, 237 N.W.2d 154 (N.D. 1975).

At the close of the State's evidence five witnesses had testified. Tony Arcand had testified as to what he observed until the time Turner pulled the gun. Ling and Clough testified as to what they observed and heard during the incident. As already noted, some of their testimony was conflicting. Dr. Philip Ruffalo testified to the treatment and cause of death of Turner. Police Chief Raymond Atol testified as to the investigation and apprehension of Granrud with the "buck knife" in his possession.

Our review of the evidence, and inferences that could be drawn from the circumstantial evidence, from a standpoint most favorable to the prosecution reflects that there is substantial competent evidence for the jury to draw the inference of guilt, even in light of the alleged self-defense. Accordingly, we conclude that the trial court properly denied

Granrud's motion for acquittal.

The second claim of error raised by Granrud concerns the instruction on self-defense.

Granrud asserts the trial court should have instructed the jury with North Dakota Pattern Jury Instruction 1716 on the right of self-defense. That instruction provides as follows:

> "The right to use deadly force in self-defense is founded upon necessity and the natural law of self-preservation. If a party to a conflict is not the aggressor and does not provoke the conflict and, as a result of some overt act of another, has reasonable grounds to believe and does believe (1) that he [or a person who he is permitted by law to protect] is in imminent danger of death or serious bodily harm and (2) that the use of deadly force is necessary to counter the danger, he is entitled to use such force as he reasonably believes necessary under the circumstances to safeguard himself [or a person whom he is permitted by law to protect]. [He is not required to retreat to a place of safety. However, the reasonableness of retreat or standing one's ground and the fact of aggression by one party against the other are circumstances which you may consider in deciding whether the right of self-defense applies. In any event, retreat is not required if retreat will continue or increase the danger.]
>
> "Generally the right to use deadly force in self-defense is not available to one who is the aggressor or provokes a conflict. However, if one is an aggressor or provokes a conflict thereafter withdraws from it in good faith and

informs his adversary by words or actions that he desires to end the conflict and he is thereafter pursued, he is justified in using deadly force to safeguard himself from imminent danger of death or serious bodily harm]"

The date on this instruction is 19 Oct. 1974 and was apparently in response to State v. Haakenson, 213 N.W.2d 394 (N.D. 1973), and also the new Criminal Code which was enacted by Ch. 116, S.L. 1973. However, the new criminal code did not go into effect until 1 July 1975.

Granrud candidly points out that the instructions on self-defense were submitted to counsel in written form for exceptions prior to being read to the jury. The transcript reflects that counsel for Granrud did not object to the instructions on self-defense nor submit pattern jury instruction 1716 to the court.

If written instructions are submitted to counsel for exception before being read to the jury, counsel must then designate the parts or omissions he deems objectionable or else waive such exception. Rule 30(c), NDRCrimp; see also, State v. Motsko, 261 N.W.2d 860 (N.D. 1977); State v. Berger, 148 N.W.2d 331 (N.D. 1967). In siuations in which no objection to alleged errors have been made at the trial court level, Rule 52(b), NDRCrimp, permits this Court to consider whether or not the alleged errors are obvious errors or errors which affect substantial rights. See

State v. Bartkowski, 290 N.W.2d 218 (N.D. 1980); State v. Schneider, 270 N.W.2d 787 (N.D. 1978).

Granrud asserts that because the Haakenson instruction is so essential to a fair trial when the question of self-defense is presented, the failure to give this instruction, whether requested or not, is obvious error. The particular part of the Haakenson instruction which Granrud contends should have been given refers to his right to use the amount of force that he (Granrud) reasonably believed necessary under the circumstances to safeguard himself.

At the close of the trial the court gave the jury the following instructions on defenses:

> "The next several Instructions will cover defenses on which there is some evidence in the case for you to consider.
>
> "In these next several Instructions on Defenses the word 'force' means physical action, threat, or menace against another.
>
> "Justification
>
> "Justification or excuse is a defense except as otherwise expressly provided in the next several instructions.
>
> "If a person is justified or excused in using force against another, but he recklessly injures another person, the justification afforded by these several Instructions are unavailable in a prosecution for such recklessness.

"Self-defense

"A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury,

except that a person is not justified in using force if:

1. He intentionally provokes unlawful action by another person to cause bodily injury or death to such other person; or

2. He has entered into a mutual combat with another person or is the initial aggressor unless he is resisting force which is clearly excessive in the circumstances. A person's use of defensive force after he withdraws from an encounter and indicates to the other person that he has done so is justified if the latter nevertheless continues or menaces unlawful action.

"Limits on use of force

"A person is not justified in using more force than is necessary and appropriate under the circumstances.

"The force exercised by a person in his own self-defense or by the person acting in the defense of another person, is not deemed excessive if it is no greater than that which the actor reasonably believed to be necessary to repel the offense at the time of the incident.

"The amount of force which may lawfully be used is not to be regulated by hindsight, but is measured by the reasonable beliefs of the person who apparently is being attacked at the time of the incident.

"Excuse

"A person's conduct is excused if he believes that the facts are such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under the several preceding Instructions, even though his belief is mistaken.

"However, if his belief is recklessly held, it is not an excuse in a prosecution for an offense for which recklessness suffices to establish culpability."

In State v. Reich, 298 N.W.2d 468, 471 (N.D. 1980, we said:

"In determining whether a jury instruction is misleading, the instruction as a whole must be considered. If, when considered as a whole, the instruction correctly advises the jury as to the law, it is sufficient although part of the instruction standing alone is insufficient or erroneous. State v. Erickson, 241 N.W.2d 854 (N.D. 1976); State v. Piper, 261 N.W.2d 650 (N.D. 1978)."

We believe that the instructions given by the trial court, as a whole, and in particular the portion dealing with limits on use of force, correctly and adequately apprise the jury of Granrud's right to use a deadly force in self-defense. Accordingly, we conclude that there was no error by the trial court in the instructions given.

The last issue raised by Granrud relates to the trial court's failure to instruct the jury on the legal definitions of "knowingly", "willfully", "intentionally", and "negligently".

Granrud was charged with manslaughter under § 12.1-16-02(1), NDCC, which provides as follows:

"A person is guilty of manslaughter, a class B felony, if he:

1. Recklessly causes the death of another human being . . ."

This section, in setting forth what constitutes manslaughter, uses the expression "recklessly causes the death" but it does not use the expressions "knowingly", "intentionally", or "negligently", nor are they components of the crime of manslaughter as defined by statute.

The trial court instructed the jury on the definition of "recklessly", but refused to instruct the jury as to "knowingly", "intentionally", and "negligently", as requested by Granrud's counsel. The jury was given the following definition of "recklessly";

"For purposes of criminal law, a person engages in conduct 'Recklessly'

if he engages in the conduct

in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct."

Granrud points to the word "conscious" in this definition and asserts the definition of "conscious" may imply knowing or willing conduct. Thus Granrud asserts that the jury

should have been instructed on the definitions of "knowingly" and "willfully". We disagree.

We believe that the instructions on "recklessly", as a whole, and in particular the phrases "conscious and clearly unjustifiable disregard" and "such disregard involving a gross deviation from acceptable standards of conduct", correctly advise the jury of the law on "recklessly" at issue in this case. Furthermore, we believe instructions on components not a part of the crime charged and at issue would be inapplicable and improper, State v. Sheldon, 301 N.D.2d 406 (N.D. 1980)[1]; State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980), and would be surplusage and tend to confuse the jury. We conclude that the refusal of the trial court to give the requested instructions was not error.

For the reasons stated in the opinion, the decision of the district court is affirmed.

All concur.

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[1]We do note that a petition for a writ of certiorari in the United State Supreme Court has been filed in State v. Sheldon. As of this date the record does not reflect what, if any, action the Supreme Court has taken on the petition.

File Cr. #728

State of North Dakota — Plaintiff and Appellee

v.

Glen Granrud, — Defendant and Appellant

ORDERED, that pages A14 and A15 of the opinion filed in this case on January 29, 1981, be deleted and that pages A17 and A18 filed this day be substituted therefor.

The Supreme Court of the State of North Dakota convened at 10:15 a.m., this 20th day of February, 1981, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

/s/Luella Dunn

Clerk of the Supreme Court

by Granrud's counsel. The jury was given the following definition of "recklessly";

> "For purposes of criminal law, a person engages in conduct 'Recklessly'
>
> if he engages in the conduct
>
> in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct."

Granrud points to the word "conscious" in this definition and asserts the definition of "conscious" may imply knowing or willing conduct. Thus Granrud asserts that the jury should have been instructed on the definitions of "knowingly" and "willfully". We disagree.

We believe that the instructions on "recklessly", as a whole, and in particular the phrases "conscious and clearly unjustifiable disregard" and "such disregard involving a gross deviation from acceptable standards of conduct," correctly advise the jury of the law on "recklessly" at issue in this case. Furthermore, we believe instructions on components not a part of the crime charged and at issue would

be inapplicable and improper, State v. Sheldon, 301 N.W.2d 406 (N.D. 1980)[1]; State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980), and would be surplusage and tend to confuse[2] the jury. We conclude that the refusal of the

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[1]We do note that a petition for a writ of certiorari in the United States Supreme Court has been filed in State v. Sheldon. As of this date the record does not reflect what, if any, action the Supreme Court has taken on the petition.

[2]The terms "knowingly" and "willfully" are the equivalent of "intentionally" as the term is used in § 12.1-16-01, NDCC, defining murder. See also, § 12.1-02-02, NDCC. If the requested instruction were given it would elevate the culpability requirement of manslaughter to that of murder which would be confusing.

Section 12.1-16-02, NDCC, sets out the culpability requirement for manslaughter and, therefore, the rationale employed in Hanson, 256 N.W.2d 364 (N.D. 1977), is not applicable. In Hanson, the court was involved with § 12.1-17-03, NDCC, entitled "Reckless endangerment" but the body of the law did not set out the culpabaility requirement and, therefore, the court pursuant to § 12.1-02-02(2), applied the culpability requirement of "willfully". However, this is not the situation in this case.

CERTIFICATE OF SERVICE

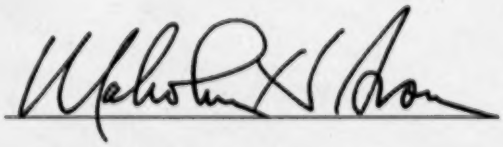
The foregoing Petition for a Writ of Certiorari and Appendix to the Petition for a Writ of Certiorari was served by mailing a true and correct copy thereof to:

Cathy Schmitz
Attorney at Law
P. O. Box 476
Williston,
North Dakota 58801

Luella Dunn
Supreme Court
State Capitol
Bismarck,
North Dakota 58505

Clerk
U.S. Supreme Court
Supreme Court Building
Washington, DC 20543

the same having been placed in the United States Mail with sufficient postage affixed, this 15th day of May, 1981.



MALCOLM H. BROWN